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No. _____

In the Supreme Court of the United States

DON S. MCAULIFFE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The issue presented for review addresses the appropriateness of the Federal government's use of 18 U.S.C. §§844(h) and (m) to prosecute a homeowner who allegedly commits arson to his personal, non-commercial residence and passively uses the mails to file insurance claims for his loss.

The components of this issue are as follows:

A. Are 18 U.S.C. §§844(h) and (m) arson statutes?;

B. Must fire be actively used in both the arson and the mail fraud components of the statutes?; and,

C. May any federal criminal statute that invades an area exclusively retained by the States be constitutional in its application per the concept of federalism?

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Petitioner, Don S. McAuliffe prays that a Writ of Certiorari issue to review the judgment and opinion of the Sixth Circuit Court of Appeals which was entered on June 22, 2007.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals is reported as *United States v. Don S. McAuliffe,* 490 F.3d 526 (6th Cir. 2007). (Appendix, hereinafter, p.1a).

JURISDICTIONAL STATEMENT

The Petitioner's conviction was affirmed by the Sixth Circuit Court of Appeals. The decision was journalized on June 22, 2007. The jurisdiction of This Court to review the judgment of the Sixth Circuit Court of Appeals is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution provisions noted in relevant part:

> Article I, Section 8, Clause 2: "The Congress shall have the Power... [t]o regulate Commerce...among the several States...";
>
> The Fifth Amendment to the United States Constitution: "No person shall be held to answer for a capital or otherwise infamous crime, unless on presentation of indictment of a Grand Jury...";
>
> The Sixth Amendment to the United States Constitution: "In all criminal prosecutions, the

accused shall...be informed of the nature and cause of the accusation...".

Title 18, U.S.C. provisions noted in relevant part:

"§844 Penalties
***
"(h) Whoever –
"(1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or
(2) ***

"...shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 10 years...".

"(m) A person who conspires to commit an offense under subsection (h) shall be imprisoned for any term of years not exceeding 20, fined under this title, or both."

STATEMENT OF THE CASE

Don McAuliffe was indicted by the Federal Grand Jury on April 23, 2003, on six counts plus one forfeiture count.

Counts one and two of this indictment were combined and alleged mail fraud under 18 U.S.C. §1341 and §2; counts three and four alleged the use of fire to commit mail fraud under 18 U.S.C. §844(h), along with a conspiracy count under 18 U.S.C. §844(n); counts five and six alleged money laundering under 18 U.S.C. §1957 and §2. The final count demanded forfeiture under modified versions of 18 U.S.C.

§981 and 28 U.S.C. §2461. The Court subsequently amended count four from 18 U.S.C. §844(n) to 844(m).

The evidence presented at trial focused generally on the Buckeye Lake Region of central Ohio, which is approximately 30 miles east of Columbus, and specifically on McAuliffe's noncommercial personal residence at 3765 North Bank Road, Millersport, Ohio. The home burned in the early morning hours of March 8, 2002, and insurance claims were filed exclusively in response thereto.

At the time of the fire, Don McAuliffe was the duly elected sitting judge of the Fairfield County Municipal Court, Lancaster, Ohio, and was vacationing in the Virgin Islands.

Two immunized witnesses testified for the government: D.J. Faller and Beth Westminster.

A jury trial commenced on 1/26/2004, and concluded on 2/13/2004, with guilty verdicts on the first six counts.

The revised presentence report was completed July 27, 2004. The sentencing hearing was conducted December 3, 2004. McAuliffe received a sentence of 207 months: 60 months with respect to the mail fraud counts 1 and 2, to be served concurrent with the remaining counts; 120 months with respect to count 3, the use of fire to commit mail fraud, this to run consecutive to counts 1 and 2 and 4, 5 and 6; 87 months regarding counts 4, 5 and 6 to run concurrent to each other and concurrent to counts 1 and 2. As stated, this resulted in a sentence of 207 months. At the sentencing hearing, the Court also fined McAuliffe $150,000.00; ordered restitution of $235,000.00; imposed a special assessment of $600.00; and finally, ordered the forfeiture of the realty at 13580 Hollywood Boulevard, Millersport, Ohio. Neither the

1997 Jeep nor the realty at 3765 North Bank Road, which were specifically noted in the indictment, were ordered forfeited. The judgment issued on December 20, 2004 reflected the sentence. Enforcement was stayed pending appeal.

McAuliffe filed a timely notice of appeal.

During the pendency of this appeal, this Court released *United States v. Booker*, 543 U.S. 220 (2005). Soon after the defendant filed his initial brief, a motion to remand for resentencing was filed by the U.S. Attorney's Office and on December 8, 2005, a *Booker* resentencing hearing was conducted by the District Court.

McAuliffe's sentence was reduced to thirty-six (36) months on counts 1, 2, 4, 5 and 6 to run consecutively with count 3 in which he received a sentence of 120 months, for a total of 156 months on the *Booker* remand.

At the *Booker* resentencing, the trial court also addressed non-*Booker* issues and amended its original sentence and judgment entry[1]. Pursuant to the amendment, the trial court

[1] Consistent with the defendant's unrebutted position at sentencing that only after-acquired property was subject to forfeiture per his indictment, the original sentence issued on 12/3/05 was limited to the property acquired by McAuliffe after the fire of 3/8/02. Thus, the only property that was subject to forfeiture was the property at 13580 Hollywood Boulevard, Millersport, Ohio. The portion of the sentence concerning the fine, order of restitution and the forfeiture of the Hollywood property was stayed, per the defendant's request and without opposition from the government, "pending appeal".

ordered McAuliffe to immediately pay the fine of $150,000.00 and restitution of $235,000.00 and also ordered the criminal forfeiture of not only the Hollywood Boulevard tract but also an additional tract and an automobile. The previous stay "pending appeal" was terminated and McAuliffe was ordered to immediately liquidate his accounts in order to satisfy the restitution and fine obligations.

McAuliffe filed another notice of appeal on December 20, 2005.

On June 22, 2007, the Sixth Circuit Court of Appeals affirmed "defendant McAuliffe's convictions and sentences."

On 12/8/05, a hearing, consistent with the government's request, was conducted concerning only the *Booker* issue. At the sentencing on this issue, the Court also, at the request of AUSA DeVillers, lifted the previous stay and additionally ordered that the defendant's Jeep and his realty at 3765 North Bank Road, Millersport, Ohio also be subject to immediate forfeiture. Both these additional items were owned by McAuliffe, but subject to liens, prior to any alleged criminal conduct by McAuliffe. *See* Federal Criminal Rule 35(a) and *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969). Neither the prosecutor nor the Court provided any expressed rationale for their actions.

It is McAuliffe's understanding that the realty at 3765 North Bank Road, Millersport, Ohio (not forfeited per initial sentencing) recently sold at a forfeiture sale for $375,000.00. McAuliffe received no credit from the sale towards his previously stayed fine and restitution order.

REASON FOR GRANTING THE PETITION

THE SIXTH CIRCUIT ERRED IN AFFIRMING McAULIFFE'S CONVICTIONS. ITS OPINION HAS CREATED CONFLICTS AMONGST THE CIRCUITS, WHERE NONE EXISTED BEFORE, CONCERNING THE APPROPRIATE INTERPRETATION OF 18 U.S.C. §§844(h) AND (m). THE CONFLICTS INVOLVE WHETHER OR NOT §844(h) IS AN ARSON STATUTE AND WHETHER OR NOT THE "ACTIVE" "USE OF FIRE" REQUIREMENT OF THE SUBSECTIONS DICTATES THAT THE FIRE BE ACTIVELY USED IN BOTH THE ARSON AND THE MAIL FRAUD COMPONENTS OF §§844(h) AND (m). ADDITIONALLY, AS A RESULT OF THE GOVERNMENT'S DISREGARDING THE COURT'S DIRECTIVES CONCERNING THE EXCLUSIVE JURISDICTION OF THE STATES IN PARADIGMATIC COMMON LAW STATE CRIMES, THIS COURT SHOULD DECLARE THAT ALL FEDERAL CRIMINAL LAWS ARE UNCONSTITUTIONAL WHEN APPLIED IN AREAS RETAINED BY THE STATES PER THE CONCEPT OF FEDERALISM.

ALTERNATIVELY, SINCE THE FEDERAL GOVERNMENT'S ENTIRE CASE IS PREDICATED ON McAULIFFE'S VIOLATING AND CONSPIRING TO VIOLATE 18 U.S.C. §844(h); AND, SINCE 18 U.S.C. §844(h) IS COMPOSED OF THE NATIONAL ARSON STATUTE (18 U.S.C. §844(i)) AND THE FEDERAL MAIL FRAUD STATUTE (18 U.S.C. §1341); AND, SINCE THIS COURT IN *JONES v.*

UNITED STATES HAS SPECIFICALLY RULED THAT THE FEDERAL ARSON STATUTE IS UNCONSTITUTIONAL AS APPLIED TO McAULIFFE'S SITUATION; THIS COURT IS RESPECTFULLY REQUESTED TO *GRANT* CERTIORARI, *VACATE* McAULIFFE'S CONVICTIONS IN LIGHT OF *JONES*, *LOPEZ* AND *BAILEY*, AND *REMAND* THE CASE FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS COURT'S PRIOR MANDATES.

OPINION

This Court is respectfully requested to grant certiorari to allow McAuliffe's appeal of the Sixth Circuit's Opinion. The ultimate issue addresses the appropriateness of the federal government's use of 18 U.S.C. §§844(h) and (m) to criminally punish a homeowner who, under the indictment, uses fire to destroy his personal, non-commercial residence.

As a result of the Sixth Circuit's ruling, there is now a split in the circuits as to whether §§844(h) and (m) are arson statutes. There is also now a split in the circuits as to what constitutes the "active" use of fire for purposes of the arson and mail fraud components of §§844(h). Finally, the Sixth Circuit's Opinion, in affirming the appropriateness of using §§844(h) and (m) in McAuliffe's situation conflicts with this Court's interpretation of the scope of federalism in *Lopez*, *Bailey* and *Jones*[2] and the resulting prohibition against the

[2] The facts in *Jones* and in this case are very similar except that in McAuliffe's case the fire occurred in Ohio, his mortgage holder was located in nearby Lancaster, Ohio, his insurance carrier was just 30 miles away from his home in Columbus, Ohio and there was no evidence that any of his utility providers were located outside of Ohio.

federal government's involvement in paradigmatic common law state crimes.

ISSUE 1(A): IS 18 U.S.C. §844(h) AN ARSON STATUTE?

18 U.S.C. reads in pertinent part:

> "(h) whoever -
> "(1) Uses fire or an explosive to commit any felony which may be prosecuted in a Court of the United States, or
> " (2) ***
> "...*shall, in addition* to the punishment provided for such felony, be sentenced to imprisonments for 10 years ..." (Emphasis added).

Section 844(h), when read in isolation, does not contain a mens rea standard. However, when one reads §844(h) in concert with the arson limitation of actions statute - 18 U.S.C. §3295 - and the definitional statute - 18 U.S.C. §3559(c)(2)(B)[3] - it is obvious that if §§844(h) and (m) are substantive criminal offenses then they are arson statutes. The culpability standard for arson statutes is the "malicious use of fire".

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[3] 18 U.S.C. §3295 provides in relevant part: Arson offenses: "No person shall be prosecuted...under...subsection (f), (h) or (i) of Section 844 unless...". 18 U.S.C. §3559(c)(2)(B) provides in relevant part: (2) Definitions (B) "...arson means an offense that has as its elements maliciously damaging or destroying...real property by means of fire or an explosive."

The grand jury indicted McAuliffe for violating §§844(h) and (n). §844(n) was amended by the Court to §844(m)[4].

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[4] Count four of McAuliffe's indictment was a conspiracy charge which used the General Conspiracy Charge (18 U.S.C. §371) format. The General Conspiracy Law requires proof of an overt act in furtherance in the conspiracy *plus* proof of a conspiratorial agreement. Neither 18 U.S.C. §§844(m) nor (n) require proof of an overt act in furtherance of the conspiratorial agreement. The maximum penalties that could have been imposed on McAuliffe for a violation of 18 U.S.C. §§371, 844(n) and 844(m) are five years, ten years and twenty years, respectively. 18 U.S.C. §844(m) had never been cited in a Shepard's citator prior to this case.

Count four alleged that McAuliffe and Faller conspired to burn down McAuliffe's residence in order to wrongfully collect insurance proceeds in violation of 18 U.S.C. §844(n). After McAuliffe was denied bail and after his arraignment but before his trial, count four was *amended* to the more punitive charge by the Court per the prosecutors' request and without the defendant's approval. There has been no representation that the amendment occurred because of a clerical error and it is unknown whether the prosecutors sought a superceding indictment from the grand jury.

The conspiracy charge was the primary focus of the Court's instructions and the government's case because it is undisputed that McAuliffe could not have set the March 8th fire (if it was a product of arson) and the March 8, 2002 fire was the exclusive basis for McAuliffe's claim against his insurer, Grange Mutual Casualty Company.

The Court's *amendment* of the indictment violated the Fifth Amendment to the United States Constitution and mandates reversal. *Stirone v. United States*, 361 U.S. 212, 217-19 (1960).

The District Court determined that arson was not a component of either 18 U.S.C. §§844(h) or (m) for the purposes of trial,[5] The Appellate Court's affirmation was apparently based on a literal four corners reading of §844(h). Apparently, the Court's position was that where Congress has failed to designate a culpability level in the specific statute, another arm of the government – the Department of Justice – can fill the deficiency. Obviously, there is no "knowing" component in either §§844(h) or (m). Consistent with the lower standard chosen by the government, AUSA DeVillers represented to the jury during his opening statement that "this is not an arson case."[6]

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[5] AUSA DeVillers emphasized the unlikelihood of coincidences throughout his closing statement. "Coincidentally", in addition to the amendments noted in footnotes 1 and 3, McAuliffe was denied bail and sentenced per an arson standard. "Coincidentally", McAuliffe was conversely indicted and tried for *know*ingly using fire per §844(h) and (m). The irony of the government's choice of a culpability standard is demonstrated by AUSA DeVillers' concession at closing that "[w]e still don't *know* how or what set the fire March 8, 2002, that burnt down North Bank."

The standard of culpability created by the Department of Justice is the same as the process used by civilized man to heat his homes, cook his foods and propel his vehicles.

[6] McAuliffe's conviction for knowingly using fire during the commission of a federal offense mandated an additional ten (10) years imprisonment. If McAuliffe's case is used as precedent, a person arrested for driving his auto (with its internal combustion engine) while under a license suspension in Washington, D.C. will be facing mandatory years in prison rather than days or weeks in jail.

The First and Eighth Circuits post *Jones* cases of *United States v. Patel*, 370 F.3d 108 (1st Cir. 2004) and *United States v. Ihmound*, 454 F.3d 887 (8th Cir. 2006) have held that the Federal Arson Statute (18 U.S.C. §844(i)) and the Federal Mail Fraud Statute (18 U.S.C. §1341) are both essential components of 18 U.S.C. §844(h). In fact, the Eighth Circuit has created a model jury instruction for §844(h) which is titled "Arson in Furtherance of Mail Fraud". The Sixth Circuit has no standard jury instructions for either 18 U.S.C. §§844(h) or (m).

If the Federal Arson Statute is a component of §844(h) and (m), then in light of *Jones* and Congress' implicit recognition of the restrictive aspects of Federalism in the last portion of §844(h)(1), the District Court lacked jurisdiction to try McAuliffe. McAuliffe was convicted of potential State crimes in Federal Court!

This Court is therefore requested to resolve these conflicts that exist amongst the Circuits concerning the culpability standard, if any, to be attributed to these subsections and determine whether the Federal Arson Statute is a component of 18 U.S.C. §§844(h) and (m).

ISSUE 1(B) : MUST "FIRE" BE ACTIVELY USED IN BOTH THE ARSON COMPONENT AND THE MAIL FRAUD COMPONENT OF 18 U.S.C. §844(h) AND (m)?

McAuliffe's case was the Sixth Circuit's first opportunity to interpret the word "use", a component of the phrase of "use of fire", since *Bailey v. United States*, 516 U.S. 137 (1995). The Sixth Circuit has declared that its opinion is "in harmony with that of our sister circuits' reasonable interpretation of the statute" - 18 U.S.C. §844(h). In fact, the

Sixth Circuit rejected the standard/test utilized by these circuits.

Bailey provides a clear directive concerning the active, rather than incidental or passive[7], quality that must be attributed to "use". At one time the Federal Firearms Statute that was dealt with in *Bailey* read almost identical to the

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[7] Passive means "submissive without objection or resistance". Passive describes McAuliffe's use of the mails to submit his claim for damages arising from the 3/8/02 fire.

The only time that the mails were improperly used per the indictment was when McAuliffe was forced to resubmit his claim for damages. McAuliffe's insurance carrier refused to recognize McAuliffe's prior faxed claim which bore his authenticated signature and *required* that McAuliffe either personally deliver the original claim or mail the same to Grange Mutual Casualty Company. Either alternative would have minimally affected commerce. In any event, the use of the mails was neither anticipated nor foreseeable when McAuliffe initially presented his claim. It is unknown whether or not his insurance company's directive was appropriate or not because the government neither presented testimony concerning the contents of the policy nor did it introduce the policy as an exhibit.

The use of the mails is the only distinguishing difference between the State crime of insurance fraud and 18 U.S.C. §1341. The former allows it and the later demands it. Additionally, for mail fraud, the use of the mails must either be planned or foreseeable *and* it must also be an active usage rather than a passive usage as in this case.

In *Jones*, where the mails were apparently used to file the insurance claim, this Court noted: "[W]e would interpret narrowly federal criminal laws that overlap the state authority unless congressional intention to assert jurisdiction is plain." *Jones*, 860.

wording in 18 U.S.C. §844(h)(1). The *Bailey* court stated that the phrase "use of firearms to commit" "indicates that Congress originally intended to reach only the situation where the firearm was *actively employed during the commission of the crime.*" *Id.* at 474, 482. (Emphasis added).

Since §844(h) contains the separate components of arson and mail fraud, fire must be actively used in both.

Obviously, if McAuliffe burned or had his home burned, he would have actively used fire in the commission of the arson component[8]. Likewise, if McAuliffe actively used fire

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[8] "There is a presumption that the fire was a result of accident or some providential cause rather than the result of a criminal design, and evidence must be presented to rebut the presumption." 5 Am. Jur. 2d *Arson and Related Offense* §47. Based on the foregoing and AUSA DeVillers' assessment of the government's case at closing, McAuliffe filed a motion for acquittal. The Sixth Circuit supported the trial court's denial of McAuliffe's motion in light of Judge Marbley's expressed conclusion that "McAuliffe and Faller"..... "placed the halogen lamp against a wall that they believed would ignite. This attempt was successful and during the early morning hours of March 8, 2002, the house caught on fire." Opinion, p.8. The trial court concluded that the halogen light was the instrument that caused the fire. This conclusion is *contrary to all evidence* and was maintained by the judge notwithstanding his being corrected by both sides at both the jury instruction conference and at sentencing.

In fact, there was no evidence that reflected that the halogen light was the cause of the March 8, 2002 fire. The Circuit Court Opinion referenced the report prepared by the fire investigation firm that provided the expert fire causation witness utilized by the government at trial. Specifically, the Opinion provided that "the report by Marzola's firm found that the halogen light fire *self-extinguished* and did not penetrate the second floor sub-floor.

per a listed component of the mail fraud scheme, then that part of §844(h) would have been satisfied as well. The "scheme" herein referenced, is delineated for purposes of the mail fraud statute as the "scheme to defraud". The scheme to defraud must be clearly set forth in the indictment and the scheme to defraud substantially proven.[9]

Opinion, p.9. The insurance company assigned no restoration expense to the halogen light fire area. The halogen light was not the source of origin for the March 8, 2002 fire! Further, in evaluating the government's case at closing, AUSA DeVillers conceded that there was no direct evidence linking McAuliffe, Faller or Westminster to the March 8th fire and, consistent with McAuliffe's arson expert's testimony concerning the likelihood of natural causation, "[w]e still don't know how or what set the fire March 8, 2002." Thus, the government did not rebut the presumption "that the fire was a result of accident or some providential cause."

[9] Judicial interpretations have increased the elements in mail fraud beyond those contained in 18 U.S.C. §1341. While the statute is written disjunctively, this Court has ruled that an indictment must specifically delineate *both* a "scheme to defraud" and a "material misrepresentation". *McNally v. United States*, 483 U.S. 350, 364-65 (1987) and *Nader v. United States*, 527 U.S. 1 (1999). It is axiomatic that the Constitution's Fifth Amendment requires that the grand jury consider every element of a charged offense prior to issuing an indictment. When the AUSA prepared indictment does not list all the elements of an offense or misstates its components, doubt must arise as to whether or not the grand jury fulfilled its Constitutional mandate.

The "scheme to defraud" in McAuliffe's indictment was set out in seven (7) specific acts attributed to McAuliffe. McAuliffe argued both at trial and at the appellate level, without response from either the government or the Courts, that none of the components were proven. For instance, it was alleged that McAuliffe increased his insurance coverage shortly before his home was destroyed. The

Both *United States v. Ruiz*, 105 F.3d 1492, 1504 (1st Cir.

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unrepudiated testimony from his insurance agent, a government witness, was that the agent unilaterally and mistakenly increased the coverage without McAuliffe's input or knowledge. Indictment counts one and two, p.2, no. 3. Also nearly every component contained a reference as to how McAuliffe had victimized Grange Insurance Company. This is a non-existing entity that was never his carrier. McAuliffe was insured by Grange Mutual Casualty Company. Indictment, counts one and two, p.2, nos. 3-5, p.3, nos. 6 & 7 and p.4.

Concerning the "material" "misrepresentation" requirements, per the indictment McAuliffe induced a non-entity to enter into a non-recourse settlement agreement by representing, not misrepresenting, to it "that the March 8, 2002 fire damage " ... had not been designed or procured by him." Counts one and two, p.3, no. 7. In fact, McAuliffe's representation to his carrier was in response to the specific question concerning the "cause and origin of the 3/8/02 fire" on the claims form. McAuliffe's written response was that he did not know the cause or origin of the 3/8/02 fire. Please compare McAuliffe's actual and also his purported representation with AUSA DeVillers' evaluation of the government's case at closing wherein he acknowledged, notwithstanding the grants of immunity, that there was no direct evidence indicating McAuliffe's, Faller's, or Westminster's involvement in the 3/8/02 fire and that "[w]e still don't know how or what set the fire March 8, 2002 that burnt down North Bank." In any event, McAuliffe's representation was never classified as a misrepresentation and certainly not a material misrepresentation. Reference is drawn to two (2) recent cases that this Court was asked to review. Specifically, *United States v. Resendiz-Ponce*, No. 05-988 (review granted) and *United States v. Omer*, No. 05-1101 (review denied). The appellate courts in both these cases mandated reversal because the indictment did not allege that the misrepresentation (not representation) was material. Please also see *Phillips v. United States*, No. 06-1602 (review requested) concerning constructive amendments not objected to at trial.

1997) and *United States v. Zendeli*, 108 F.3d 879, 885 (7th Cir. 1999) have ruled that in §844(h) cases (both cases dealt with arson to commercial properties) if the "use of fire" was a specific component in the mail fraud's scheme to defraud per the indictment, then the active use of fire in the mail fraud component of §844(h) was satisfied. Conversely, logic dictates that if the scheme to defraud does *not* contain an express component alleging that the defendant set the fire that burned down his home for the purpose of wrongfully receiving insurance benefits and thereby defrauding his insurance provider, then fire was not actively used in the commission of mail fraud. Notwithstanding there being no allegation like this in either counts one or two of McAuliffe's indictment, the Sixth Circuit affirmed the trial court. This ruling is in direct conflict with its "sister circuits reasonable interpretation of the statute"! McAuliffe's indictment that dealt with mail fraud specifically delineated the components of the scheme to defraud which were deemed relevant by the grand jury. McAuliffe's mail fraud counts did not allege that he or anyone else burned down McAuliffe's home, much less, burned it down for the purpose of presenting a fraudulent claim to either his insurance company or Grange Insurance Company, a fictitious entity created by the government.

This Court is requested to resolve this conflict which has resulted in inconsistent decisions amongst the circuits, concerning the appropriate test for determining the active use of fire in the arson and mail fraud components of 18 U.S.C. §§844(h) and (m).

ISSUE I(C): IS EVERY FEDERAL CRIMINAL STATUTE THAT INVADES AN AREA EXCLUSIVELY RETAINED BY THE STATES UNCONSTITUTIONAL IN ITS APPLICATION PER THE CONCEPT OF FEDERALISM?

Several years prior to McAuliffe's indictment, this Court issued its decision in *Jones v. United States* (2000), 528 U.S. 848 (2000). In *Jones*, the facts reflect that Jones threw a Molotov cocktail into the Indiana owner occupied residence not used for commercial purposes. The fire bomb caused major fire damage and $77,396.87 was received from the out-of-state insurance carrier. Upon his sentencing, Jones was ordered to repay his Wisconsin carrier apparently because he submitted a fraudulent insurance claim. The claim was presumably submitted by mail due to the distance between the loss location and the insurance carrier. Other than the issue of causation and the out-of-state entities that provided services to Jones, the relevant facts of these two cases are the same. This Court concluded that the interaction between Jones and the out-of-state entities was minimal and insufficient to allow intrusion by the federal government into an area that historically has been reserved for State action.

At issue is whether or not any §844 sub-section, be it §844(i) as in *Jones* or §§844(h) and (m) as in McAuliffe's case, can be utilized by the federal government to prosecute an individual who sets fire to his personal, non-commercial residence.

Factually, McAuliffe impacted commerce even less than Jones. Unlike Jones, McAuliffe's residence, his mortgage company, his insurance company and the utility companies serving his home were all located in Ohio. The evidence was unrebutted that McAuliffe only used the mails to submit his

claim for the 3/8/02 fire after his initial faxed claim was rejected by his insurance carrier.

18 U.S.C. §844 is a component of the Organized Crime Bill of 1970. Section 844 was enacted in response to acts of terrorism which occurred during the Viet Nam Era protests. Later, certain acts of arson were included with explosives as part of the Anti Arson Act of 1982. The reason for the inclusion of fire with explosives was causation related – *i.e.*, did the act of arson cause the explosion or vice versa.

Section 844 is comprised of numerous sub-sections. Some of the sub-sections are clearly substantive [§§844(d), (e), (f), (g), (i), (o) & (p)]; some are non-substantive penalty provisions [§§844(a), (k), (l), (m), and (n)[10]; one is procedural [§844(c)], and one is definitional [§844(j)]. The questionable sub-section, §844(h), is however subject to multiple interpretations. §844(h) appears on its face to be either a general catch-all statute[11] or a non-substantive penalty

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[10] Subsections 844(m) and (n) read as follows:

> "(m) A person who conspires to commit an offense under subsection (h) shall be imprisoned for any term of years not exceeding 20, fined under this title, or both.
>
> "(n) Except as otherwise provided in this section, a person who conspires to commit any offense defined in this chapter shall be subject to the same penalties (other than the death penalty) as the penalties prescribed for the offense the commission of which was the object of the conspiracy."

[11] The prohibition against using a general statute in lieu of a specific statute is explained in *Bobb v. Attorney General of U.S.*, 458 F.3d 220, 223-24 (3d Cir. 2006). *See also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). When the specific statute

enhancement[12] provision. As reflected by the cases heretofore cited, some courts have allowed this sub-section to be utilized as an ancillary statute when it addresses, along with 18 U.S.C. §844(i) and 18 U.S.C. §1341, commercial arson situations.

United States v. Lopez, 514 U.S. 549 (1995) greatly influenced the *Jones* court and is most relevant to this case. *Lopez* was a landmark decision regarding the concept of and restrictive aspects of Federalism. The tenet of Federalism provides that the federal government has only those powers ceded to it in the United States Constitution by the States. In response to *Lopez*, Congress promptly amended many existing criminal laws to show on their face a nexus to interstate commerce. For example, the National Arson Statute was amended to ensure that it was not summarily dismissed as being unconstitutional. 18 U.S.C. §844(i) as with other substantive federal criminal statutes listed under Section 844, was amended by adding the phrase "used interstate or any activity affecting intrastate commerce". Congress chose not however to amend §§844(h) or (m)!

The Justices in *Jones*, exercising judicial restraint, reiterated the Court's *Lopez* directive to the federal government that it must cease to intrude into areas exclusively reserved for the States. The Court specifically noted: (1) "We

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has been declared unconstitutional in its application, the logic of the prohibition against substitution via a general statute (particularly where the general statute has as one of its components the unconstitutional statute) is enhanced.

[12] Subsection 844(h) does not have a mens rea component listed in the subsection and specifically provides for the enhancement of other federal crimes when arson is used in their commission.

would interpret narrowly federal criminal laws that overlap with the state authority"; (2) "There is a well established presumption against the pre-emption of state law"; and (3) "arson is a paradigmatic common-law state crime".

Because of the similarity in McAuliffe's case and *Jones'*, one must conclude that this Court has been challenged. The government instead of heeding the reiterated directives of the Court, again usurped the state's prerogative and indicted McAuliffe with charges which fail the *Lopez* directive. Further, per *Jones*, the subsections are unconstitutional as applied because the National Arson Statute is a component of §844(h) and (m).

The United States Attorney's position in this area is effectively summarized by the title of the *pre-Bailey*, *pre-Lopez* and *pre-Jones* treatise which the government cited in support of its Sixth Circuit position. The title is "Federalizing Fires: The Evolving Federal Response to Arson Related Crimes". The Court's direction has changed since the 1985 publication but the U.S. Attorney's expansive, unwarranted concept of Federalism has not.

No case will appear before this Court which will better serve as a basis for an absolute declaration to the Justice Department that Federalism prohibits the utilization of federal law to prosecute one who misuses fire in a manner consistent with *Jones* and McAuliffe. This is also an appropriate opportunity for the Court to address another paradigmatic common law state crime which frequently goes hand in hand with arson. Insurance fraud is also a paradigmatic common law state crime that should be dealt with exclusively by the States, particularly when it is coupled with arson to one's

non-commercial residence[13] and the use of the mails is "passive". *Jones*, 855.

This Court is therefore respectfully requested to grant McAuliffe certiorari in order to resolve Circuit Courts conflicts and/or provide a less restrained response for the United States Attorney's Office pertinacious conduct concerning its intrusion into paradigmatic common law state crimes such as arson and insurance fraud.

Further, since the federal government's entire case is predicated on McAuliffe's violating and conspiring to violate 18 U.S.C. §844(h); and, since 18 U.S.C. §844(h) is composed of the National Arson Statute (18 U.S.C. §844(i)) and the Federal Mail Fraud Statute (18 U.S.C. §1341); and, since this Court in *Jones v. United States* has specifically ruled that the Federal Arson Statute is unconstitutional as applied to McAuliffe's situation; this Court is respectfully requested to *grant* certiorari, *vacate* McAuliffe's convictions in light of *Jones*, *Lopez* and *Bailey*, and *remand* the case for further proceedings consistent with this Court's prior mandates.

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[13] The generic claims form provided to McAuliffe by his insurance company, Grange Mutual Casualty Co., delineated therein the content of the criminal insurance fraud laws for Ohio, Kentucky, Indiana and Tennessee. The form was marked "Government Exhibit 8-li" No reference was made to any federal charge(s).

CONCLUSION

For the foregoing reasons, the petitioner requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-3016

[Filed June 22, 2007]

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)
v.	)
DON S. MCAULIFFE, Defendant-Appellant.	)

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 07a0238p.06

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 03-00070—Algernon L. Marbley, District Judge.

Before: MERRITT, DAUGHTREY, and GRIFFIN,
Circuit Judges.

OPINION

GRIFFIN, Circuit Judge. On March 8, 2002, a fire destroyed the Millersport, Ohio, lakeside residence of defendant-appellant Don S. McAuliffe, a duly-elected sitting judge of the Fairfield County Municipal Court, Lancaster, Ohio. At the time of the fire, defendant was vacationing in the Virgin Islands. Defendant twice sent verified proof of loss claim forms to his insurer, Grange Mutual Casualty Company ("Grange"), via United States mail, representing in the forms that "the cause and origin of the said loss were: UNKNOWN TO CLAIMANT." Defendant eventually settled his claim for $235,000. He used the insurance proceeds to pay off the mortgage on the destroyed property and a car loan, and to make a down payment on another parcel of real estate. Federal, state, and local authorities, however, became suspicious that the fire had been purposefully set by defendant and a business partner, Darrell Faller, as part of a scheme to defraud the insurance company.

On April 23, 2003, following an investigation into the matter, a federal grand jury in the Southern District of Ohio indicted defendant on charges of mail fraud, in violation of 18 U.S.C. § 1341 (Counts One and Two); using fire to commit mail fraud, in violation of 18 U.S.C. § 844(h)(1) (Count Three); conspiring to use fire to commit mail fraud, contrary to 18 U.S.C. § 844(m) (Count Four);[1] and money-laundering, in violation of 18 U.S.C. § 1957 (Counts Five and Six). The indictment sought forfeiture of the insurance proceeds, as well

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[1] Count Four inadvertently referenced 18 U.S.C. § 844(n); the district court allowed the Government to amend the indictment to substitute subsection (m) for (n).

as the real and personal property acquired with those proceeds.

Following a nearly three-week jury trial, defendant was convicted as charged on all counts. The district court originally sentenced defendant to 207 months of imprisonment; specifically, 60 months on Counts One and Two; 87 months on Counts Four, Five, and Six, to run concurrently to each other and to the sentences on Counts One and Two; and 120 months on Count Three, to be served consecutively. Defendant filed a timely notice of appeal and, while the appeal was pending, this court remanded for re-sentencing in light of the newly issued decision in *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). Defendant was re-sentenced to a total of 156 months of imprisonment: concurrent sentences of 36 months on Counts One, Two, Four, Five, and Six, and a consecutive sentence of 120 months on Count Three. A final order of forfeiture was entered by the court. The amended judgment of conviction and sentence was entered on December 20, 2005, the same date on which defendant filed the present appeal.[2]

In his appeal, defendant challenges the sufficiency of the evidence and alleges, *inter alia*, that defects in the indictment and improper constructive amendments to it mandate reversal of his convictions. For the reasons set forth below, we affirm.

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[2] A corrected amended judgment of conviction was later entered on January 11, 2006, modifying only the portion of the judgment pertaining to restitution. Pursuant to the amendment, defendant was ordered to pay immediately a fine of $150,000, make restitution of $235,000, and forfeit two pieces of real estate, along with a vehicle. Defendant was ordered to liquidate his accounts in order to satisfy these obligations.

I.

Defendant first alleges numerous deficiencies in the indictment and maintains that the indictment was constructively amended through the jury instructions given by the district court. Defendant concedes that he did not raise these challenges below; thus, review is for plain error. FED. R. CRIM. P. 52(b); *United States v. Cotton*, 535 U.S. 625, 631-32, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002).

We review the sufficiency of an indictment de novo. An indictment is generally sufficient if it "fully, directly, and expressly . . . set[s] forth all the elements necessary to constitute the offense intended to be punished." *United States v. Douglas*, 398 F.3d 407, 411 (6th Cir. 2005) (internal citation and quotation marks omitted). In particular, the indictment must: (1) "set out all of the elements of the charge[d] offense and must give notice to the defendant of the charges he faces[,]" and (2) "be sufficiently specific to enable the defendant to plead double jeopardy in a subsequent proceeding, if charged with the same crime based on the same facts." *Id.* at 413 (internal citation omitted). "An indictment will usually be sufficient if it states the offense using the words of the statute itself, as long as the statute fully and unambiguously states all the elements of the offense." *United States v. Superior Growers Supply, Inc.*, 982 F.2d 173, 176 (6th Cir. 1992). However, the recitation of statutory language "'must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description with which he is charged.'" *Id.* (quoting *Hamling v. United States*, 418 U.S. 87, 117-18, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974)).

The indictment must be read as a whole, accepting the factual allegations as true, and construing those allegations in

a practical sense with all the necessary implications. *United States v. Reed*, 77 F.3d 139, 140 n.1 (6th Cir. 1996) (en banc). An indictment is to be construed liberally in favor of its sufficiency. *United States v. Davis*, 306 F.3d 398, 411 (6th Cir. 2002).

Here, defendant contends that Counts One and Two of the indictment, which allege violations of the mail fraud statute, 18 U.S.C. § 1341, do not adequately set forth two of the requisite elements of that offense: (1) that defendant acted willfully with an intent to defraud, and (2) that a "material" misrepresentation was made.

The mail fraud statute prohibits the use of the mails by any person "having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . ." 18 U.S.C. § 1341. "Mail fraud consists of (1) a scheme or artifice to defraud; (2) use of mails in furtherance of the scheme; and (3) intent to deprive the victim of money or property." *United States v. Turner*, 465 F.3d 667, 680 (6th Cir. 2006). Materiality of falsehood is a requisite element of mail fraud. *Neder v. United States*, 527 U.S. 1, 25, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). The misrepresentation "must have the purpose of inducing the victim of the fraud to part with the property or undertake some action that he would not otherwise do absent the misrepresentation or omission." *United States v. Daniel*, 329 F.3d 480, 487 (6th Cir. 2003). A misrepresentation "is material if it has a natural tendency to influence, or is capable of influencing, the decision of the decision-making body to which it was addressed." *Neder*, 527 U.S. at 16 (internal citation and quotation marks omitted).

The requisite intent to defraud requires "an intent to deceive or cheat for the purpose of either causing a financial loss to another or bringing about a financial gain to oneself." Sixth Circuit Pattern Jury Instruction 10.01(2)(E); *see also United States v. Frost*, 125 F.3d 346, 371 (6th Cir. 1997). With regard to both elements at issue, an indictment is not fatally insufficient for its failure to allege these elements *in haec verba*, if the facts alleged in the indictment warrant the inference of such elements, i.e., materiality and intent to defraud. *United States v. McGough*, 510 F.2d 598, 602 (5th Cir. 1975) (materiality); *United States v. Hoag*, 823 F.2d 1123, 1126 (7th Cir. 1987) (intent to defraud).

In this case, the indictment more than adequately alleges the elements of materiality and intent to defraud. Paragraph 1 of the indictment includes in the allegations the statutory language of § 1341. Paragraph 5 of the indictment alleges that defendant "falsely represented to Grange Insurance Company that the fire damage to the dwelling [at issue] and its contents was not caused by design or procurement on his part, though he then well knew otherwise." Paragraphs 6 and 7 similarly allege that defendant submitted two sworn proof of loss statements which "falsely represented" that the March 8, 2002, fire damage to the residence "had not been designed or procured by him . . . though he then well knew that his acts in planning and causing the fire damage eliminated his right to payment under the insurance policy." Certainly these allegations, that defendant's representation that the cause of the fire damage was unknown to him, related to a matter that had a "tendency" to influence Grange's decision to settle his claim. The indictment alleges that defendant made these misrepresentations "well knowing" that his role in the scheme barred his right to recover the insurance proceeds.

In addressing a similar claim involving the analogous bank fraud statute,[3] 18 U.S.C. § 1344, the Second Circuit Court of Appeals, in *United States v. Klein*, 476 F.3d 111 (2d Cir. 2007), recently held:

> It is true that a bank fraud conviction requires a showing that the fraudulent conduct was material, *Neder v. United States*, 527 U.S. 1, 25, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999), although the bank fraud statute does not contain that actual word. 18 U.S.C. § 1344. In *Neder*, the Supreme Court held that materiality was an element of bank fraud because the word fraud incorporated fraud's "well-settled meaning at common law" – a "misrepresentation or concealment of *material* fact." *Id.* at 22. Appellant claims, therefore, that the indictment is insufficient because it does not explicitly use the word "material." Appellant did not raise this issue in the district court, and thus we review only for plain error. *United States v. Acosta*, 470 F.3d 132, 135 (2d Cir. 2006) (per curiam).
>
> There was no error. If materiality can be inferred to be an element of criminal fraud because of the well-understood meaning of "fraud" as a legal term, an allegation of materiality can be inferred from use of the word fraud in the indictment. Moreover, as commonly understood among both lawyers and

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[3] The bank, mail, and wire fraud statutes all employ identical "scheme to defraud" language and thus are to be interpreted *in pari materia*. *United States v. Stavroulakis*, 952 F.2d 686, 694 (2d Cir.1992); *United States v. Oren*, 893 F.2d 1057, 1060 n.1 (9th Cir. 1990).

> laypersons, "fraud" refers to conduct or speech intended to mislead the putative victim into parting with money or property. *See United States v. Resendiz-Ponce*, 127 S. Ct. 782, 784, 166 L. Ed. 2d 591 (2007) (agreeing with the Government that "the indictment at bar implicitly alleged that respondent engaged in the necessary overt act simply by alleging that he attempted to enter the United States," because "[n]ot only does the word 'attempt' as used in common parlance connote action rather than mere intent, but more importantly, as used in the law for centuries, it encompasses both the overt act and intent elements" of the crime of attempted illegal reentry (internal quotation marks omitted)). The materiality of the misleading conduct or speech is therefore at the heart of the word "fraud." Conduct or speech that is immaterial – irrelevant – to a putative victim cannot be fraud. Finally, each of the counts on which appellant was convicted contained an allegation that he obtained money or credit "by means of false or fraudulent . . . representations." Again, one cannot fraudulently induce a victim to part with money or credit "by means of" immaterial representations.

Klein, 476 F.3d at 113-14.

Contrary to defendant's argument, a reading of the indictment as a whole supports the government's position that Counts One and Two adequately aver the requisite elements of the offense of mail fraud. Moreover, defendant has not shown that the alleged deficiencies affected his substantial rights or the fairness, integrity, or public reputation of these proceedings, as required by a plain error analysis. *Cotton*, 535 U.S. at 631-32.

Defendant next alleges that the indictment misidentified "Grange Insurance Company" as the victim of his scheme, rather than the properly titled "Grange Mutual Casualty Company." This argument is without merit - generally, the identity of the victim of a fraudulent scheme is not an essential element that the government is required to prove, *United States v. Otto*, 850 F.2d 323, 326 (7th Cir. 1988); *United States v. Trapilo*, 130 F.3d 547, 552 (2d Cir. 1997), and, in any event, defendant has shown neither that he was prejudiced as a result of the error in the description nor that he lacked notice as a result of the claimed mistake. Indeed, in his written communications with his insurer, he referred to the company as either "Grange" or "Grange Insurance."

Defendant further claims that Count Three, which alleges a violation of 18 U.S.C. § 844(h)(1), does not charge him with an offense cognizable under federal law. Defendant complains that certain language in Count Three, stating that defendant "damaged" or "destroyed" his home "by means of fire," contains terminology that also appears in 18 U.S.C. § 844(i), the arson statute which was not the basis for the indictment. Defendant in essence argues that the indictment blurs the requisite elements of the crime with which he was charged and "[b]eing convicted for committing and conspiring to commit a hybrid law (a bit of § 844(h) and a bit of § 844(i)) not created by Congress is a plain error that 'seriously affects the fairness, integrity, or public reputation.'"

McAuliffe's argument is indeed without merit, as the government argues. Section 844(h)(1) makes it a crime to "use[] fire or an explosive to commit any felony which may be prosecuted in a court of the United States[.]" Count Three of the indictment alleges that on or about March 8, 2002, defendant "knowingly used fire to commit mail fraud, as

more fully set forth in Counts One and Two, incorporated herein by reference, in violation of 18 U.S.C. § 1341, a felony prosecutable in a court of the United States. In violation of 18 U.S.C. § 844(h) and § 2." These allegations mirror the statutory text and are sufficiently accompanied by such facts and circumstances as will inform the accused of the specific offense, coming under the general description with which he is charged. The mere fact that some of the operative terms of § 844(i) appear in the indictment does not diminish the fact that Count Three sufficiently alleges a violation of § 844(h).

Defendant also maintains that the jury instructions constructively amended the indictment and therefore require reversal of his convictions. Specifically, he complains that, although Counts One and Two of the indictment "correctly" charged him with "devis[ing] a scheme and artifice to defraud, *and* for obtaining money and property by means of false and fraudulent pretenses, representations and promises," (emphasis added), the jury instructions improperly substituted the disjunctive "*or*" for the italicized "*and*." Defendant contends that this had the effect of broadening the bases for conviction beyond what the grand jury had alleged, in violation of his Fifth Amendment rights.

"A constructive amendment to the indictment occurs when 'the terms of the indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of an offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment.'" *United States v. Manning*, 142 F.3d 336, 339 (6th Cir. 1998) (quoting *United States v. Hathaway*, 798 F.2d 902, 910 (6th Cir. 1986)). A defendant bears the burden of proof on this issue. *United States v. Rashid*, 274 F.3d 407,

414 (6th Cir. 2001). "A constructive amendment to the indictment constitutes a per se violation of the fifth amendment's grand jury clause." *United States v. Syme*, 276 F.3d 131, 148 (3d Cir. 2002) (internal quotation omitted).

Title 18 U.S.C. § 1341, however, uses the disjunctive "or," not "and" ("Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . ."). "It is settled law that an offense may be charged conjunctively in an indictment where a statute denounces the offense disjunctively. Upon the trial, the government may prove and the trial judge may instruct in the disjunctive form used in the statute." *United States v. Murph*, 707 F.2d 895, 896 (6th Cir. 1983) (internal citation omitted). A constructive amendment claim has thus been rejected in the present context. *See United States v. Stone*, 954 F.2d 1187, 1192 (6th Cir. 1992) (involving similar language in bank fraud statute, 18 U.S.C. § 1344). Thus, defendant's contention in this regard is without merit, as are his remaining claims pertaining to alleged constructive amendments to the indictment.

II.

Defendant next challenges his convictions and sentences stemming from Counts Three and Four of the indictment. 18 U.S.C. § 844(h)(1) provides that "[w]hoever . . . uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States" shall "in addition to the punishment provided for such felony, be sentenced to imprisonment for 10 years." Subsection (m) covers *conspiracy* to commit an offense under subsection (h). As previously noted, the indictment charged defendant with the underlying offense of using fire to commit mail fraud in

violation of 18 U.S.C. § 1341. Defendant contends that, pursuant to §§ 844(h) and (m), the requirement that "fire" be "used to commit" mail fraud was not met because if he committed mail fraud, he did so by using the mails, not by "using" fire.

McAuliffe's interpretation of the statute, however, has been considered and rejected by several courts. In *United States v. Ruiz*, 105 F.3d 1492 (1st Cir. 1997), the First Circuit Court of Appeals rejected this construction of the statute urged by the present defendant and by the defendants therein. Construing the word "use" in accord with its ordinary or natural meaning, the court noted that "use" generally means "[t]o convert to one's service," "to employ," "to avail oneself of," and "to carry out a purpose or action by means of." 105 F.3d at 1503 (internal citations and quotation marks omitted). The *Ruiz* court opined:

> We think it plain that the defendants "used" fire to commit mail fraud within the meaning of § 844(h)(1). The defendants set fire to Brothers Fashions "to carry out" their scheme to deceive the insurance company into making payment for claimed losses. Specifically, the fire constituted "the means" by which the defendants attempted to create the appearance of a legitimate loss of insured items. While the defendants also "used" the mails in furtherance of the scheme to defraud, that does not diminish the fact that, additionally, they "employed" or "availed themselves of" fire to effect their scheme. Finally, the defendants make no argument that the placement and purpose of the word "use" in its statutory context undermine the applicability of § 844(h)(1) here. *See Bailey* [*v. United States*], 516 U.S. [137, at [143], 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995)] (considering disputed language

> in the context of overall statutory scheme). No basis for such an argument is apparent.

105 F.3d at 1503-04 (internal citation and footnotes omitted). *See also United States v. Zendeli*, 180 F.3d 879, 885 (7th Cir. 1999) ("As the First Circuit held in [*Ruiz*], a defendant uses fire to commit mail fraud under § 844(h) when he initiates a fire as part of a scheme to deceive an insurance company into making payments for claimed losses. Under such circumstances, fire constitutes the means by which the individual attempts to create the appearance of legitimate loss of an insured item.") (internal citation omitted).

The Eighth Circuit Court of Appeals recently endorsed this position as well, favorably citing *Ruiz* in a decision upholding a § 844(h)(1) conviction arising from a fire-related insurance fraud scheme involving the mails. *See United States v. Ihmoud*, 454 F.3d 887, 890-91 (8th Cir. 2006).

We agree with our sister circuits' reasonable interpretation of the statute and add that such a construction of the statute is consistent with the legislative history of § 844(h), which indicates that "fire" was added to this statute (originally, only "an explosive" was designated) in 1982, because it was recognized that fire is commonly and extensively used not only for extortion, but for insurance fraud as well. Anti-Arson Act of 1982, Pub. L. No. 97-298, 96 Stat. 1319; *see* H.R. Rep. 678, 97th Cong., 2d Sess., *reprinted in* 1982 U.S.C.C.A.N. 2631, 2632 (1982).[4] Thus, § 844(h)(1) creates

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[4] "We are mindful of the limited utility and reliability of legislative history. In this regard, 'the authoritative statement is the statutory text, not the legislative history or any other extrinsic material.' *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568,

a federal offense with an enhanced penalty for persons who commit crimes "that do not require but may involve the use of fire." *United States v. Patel*, 370 F.3d 108, 117 (1st Cir. 2004). Defendant's argument is without merit.

III.

In an argument raised for the first time on appeal, defendant argues that because 18 U.S.C. §§ 844(h) and (m) do not bear a sufficient nexus to interstate commerce, these provisions are not a valid exercise of Congress's commerce clause power. Consequently, he contends, they are unconstitutional in light of *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), because these subsections "have nothing to do with 'commerce' or any sort of economic enterprise" and contain "no jurisdictional element which would ensure . . . that the [alleged illegal act] in question affects interstate commerce." *Lopez*, 514 U.S. at 561.

Although this court has not addressed this specific issue, in *United States v. Creech*, 408 F.3d 264 (5th Cir. 2005), the Fifth Circuit Court of Appeals expressly rejected the argument now made by defendant:

> First, Creech raises a Commerce Clause challenge to 18 U.S.C. § 844(h), which provides an additional penalty for anyone who "uses fire . . . to commit any felony which may be prosecuted in a court of the United States." He essentially argues that because the

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125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005)." *City of Cookeville v. Upper Cumberland Elec. Membership Corp.*, 484 F.3d 380, n.6 (6th Cir. 2007).

statute does not require a jurisdictional nexus with interstate commerce to be proved in court, it does not come under Congress's authority to regulate interstate commerce. Because Creech did not raise this challenge below, we review for plain error. *See Johnson v. United States*, 520 U.S. 461, 467-68, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997).

Creech's argument fails because § 844(h)'s jurisdictional nexus is derived from the underlying felony, which must be one that "may be prosecuted in a court of the United States." By definition, then, a violation of § 844(h) must necessarily be based on an underlying crime that is properly within federal jurisdiction. *Cf. United States v. Pappadopoulos*, 64 F.3d 522, 528 (9th Cir. 1995) (finding that "Section 844(h) does not facially exceed Congress's commerce power because it requires that the underlying felony itself be one that can be prosecuted 'in a court of the United States.'"). Indeed, we have previously found a very similar statute, 18 U.S.C. § 924(c), "a valid exercise of Congress' commerce power, even though no specific nexus with interstate commerce is required for conviction." *United States v. Owens*, 996 F.2d 59, 61 (5th Cir. 1993).

Here, the underlying felony crime was mail fraud in violation of 18 U.S.C. § 1341. Creech does not contend that § 1341 is an invalid exercise of Congress's Commerce Clause power. Consequently, we find that Creech's indictment and conviction under § 844(h) was not unconstitutional.

408 F.3d at 267 (footnote omitted).

Here, as in *Creech*, mail fraud, the underlying offense, is not challenged by defendant as violative of the Commerce Clause. We thus adopt the sound rationale of the court in *Creech* and, applying it to the present circumstances, conclude that defendant's Commerce Clause challenge cannot prevail.

In a related argument pertaining to the validity of his convictions under §§ 844(h) and (m), defendant notes that, pursuant to *Jones v. United States*, 529 U.S. 848, 120 S. Ct. 1904, 146 L. Ed. 2d 902 (2000), the arson of an owner-occupied private residence not used for any commercial purpose is not subject to prosecution under the arson statute, 18 U.S.C. § 844(i). Defendant maintains that the government circumvented this proscription, which would apply to the present circumstances involving a private residence, by charging defendant under § 844(h) but, in reality, trying the case as if it were an arson, not mail fraud, prosecution. Defendant also cites the *Ihmoud* court's reference to § 844(h)(1) as a provision involving " *arson* in furtherance of mail fraud," rather than the use of fire to commit mail fraud, *Ihmoud*, 454 F.3d at 892 (emphasis added), as reinforcement for his claim that he was effectively but improperly convicted of arson, not mail fraud.

Defendant's reliance upon the *Jones* and *Ihmoud* decisions is misplaced. Unlike defendant, who could not be and was not in fact prosecuted for arson because his conduct in burning his own noncommercial residential home does not fall within the ambit of the arson statute, 18 U.S.C. § 844(i), as interpreted in *Jones*, the defendant in *Ihmoud* actually was charged with and convicted on charges of arson, conspiracy to commit arson, and the use of fire to commit mail fraud for his actions in setting fire to several commercial establishments to which the arson statute applies. *Ihmoud*, 454 F.3d at 888, 895.

Moreover, the *Ihmoud* court's reference to "arson in furtherance of mail fraud" was made in the context of addressing the defendants' challenge to the district court's jury instructions using such language and its alleged failure to specify in the instructions that the underlying felony necessary to support a § 844(h) offense was mail fraud, not arson. The *Ihmoud* court noted that "[t]o the extent that there is ambiguity in the instructions, it is harmless. The evidence at trial overwhelmingly demonstrates that the purpose of the fire was to commit mail fraud by fraudulently collecting insurance payments." *Id.* at 893. Here, defendant's effort to characterize his convictions pursuant to Counts Three and Four as convictions for arson, rather than using fire to commit mail fraud, is unpersuasive, and plain error is not evident.

IV.

Defendant next challenges the sufficiency of the evidence. Defendant moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29 at the close of the government's proofs, arguing that the evidence was insufficient to demonstrate that he and Faller conspired to burn down his residence. The district court denied the motion and, upon defendant's filing of a renewed post-trial motion for dismissal, the court issued an opinion and order, dated May 24, 2004, again denying the motion.

An order denying a motion for judgment of acquittal is reviewed de novo. *United States v. Kone*, 307 F.3d 430, 433 (6th Cir. 2002). This court reviews the evidence in a light most favorable to the prosecution, giving the prosecution the benefit of all reasonable inferences from the testimony. *United States v. Abboud*, 438 F.3d 554, 589 (6th Cir. 2006). The relevant question in assessing a challenge to the

sufficiency of the evidence is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.*

We agree with the district court that there was ample evidence on which to convict defendant. At trial, Faller testified as a witness for the government that he and defendant conspired to burn down defendant's house so that defendant could obtain the insurance proceeds and use the proceeds to demolish the house and rebuild it. They arranged for defendant to be out of town when Faller started the fire. Defendant's former girlfriend, Beth Westminster, also testified as a government witness, corroborating that Faller and defendant conspired to burn down the house with the ultimate purpose of rebuilding it. In their first attempt, defendant and Faller tried to rupture a gas line in the house; however, this attempt failed. Faller testified that he and defendant then made a second attempt to burn down the residence by placing a halogen lamp against a wall that they believed would ignite. This attempt was successful and, during the early morning hours of March 8, 2002, the house caught fire.

An insurance adjuster investigated the fire damage and observed fire damage on the lower level, but also noticed more extensive fire damage on the upper level of the home. Due to suspicions about the cause and origin of the fire, she then referred the matter to a consulting firm. Richard Marzola, an electrical engineer, took photos and collected debris from the site. He observed the burn patterns near the lamp, but also noticed a second set of burn patterns at the base of the stairs to the upper level. At his request, two experienced arson investigators were sent to the residence for further investigation. The final report issued by Marzola's firm found neither evidence of a "foreign ignitable liquid" nor

"an electrical malfunction or abnormality," but concluded, based on the two unrelated points of origination, that the "cause of this fire loss was an intentional human action." The report indicated that the burn patterns associated with the first point of origin (the lamp) on the lower level of the house indicated that the fire traveled up the wall and into the ceiling joists, but eventually self-extinguished and did not penetrate the second floor sub-floor. The patterns associated with the second point of origin (base of the stairs) indicated that the resultant fire "progressed up the stairs" and caused "extensive direct flame damage . . . throughout the second floor."

Grange Insurance sent defendant a reservation-of-rights letter stating in part that the fire at defendant's Northbank Road residence "has been determined to have been deliberately set." Two days later, the claims adjuster sent defendant a claim form entitled "Property Sworn Statement in Proof of Loss." It is undisputed that defendant returned the completed and notarized form to Miller via fax, with the original being sent by United States mail. In signing the form, defendant agreed "that the loss did not occur because of any act or design on [his] part" and that "[n]othing has been done to conceal or misrepresent any material facts concerning this claim, nor to deceive the company." In response to the first question on the form, defendant replied that "the cause and origin of the said loss were: UNKNOWN TO CLAIMANT." Defendant sought $361,925 for damages to the real and personal property.

On April 9, 2002, the claims adjuster sent a letter to defendant rejecting his claim for failure to provide sufficient detail and documentation. Defendant responded by letter, disputing her assertions and requesting a new adjuster. The successor adjuster who was assigned to defendant's claim settled defendant's claim in April of 2002 for $235,000.

Pursuant to this settlement, defendant again was required to submit a signed and notarized "Property Sworn Statement in Proof of Loss (Revised)," which reiterated that the origin of the fire loss was "unknown to claimant." Defendant mailed this revised form to Grange via U.S. mail. Defendant thereafter received two settlement checks from Grange - one in the amount of $95,000 for the personal property claim, and the other for $140,000 for the real property loss. Defendant used the proceeds to pay off his mortgage on the residence, to pay off a loan on a vehicle, and to purchase another real estate parcel.

The business relationship between defendant and Faller thereafter soured, and Faller contacted an attorney, who in turn contacted an agent with the Bureau of Alcohol, Tobacco and Firearms ("ATF"). In exchange for his cooperation, Faller was granted immunity from prosecution. He described to authorities his role and defendant's involvement in the planning and execution of the fire for the purpose of obtaining insurance proceeds. Over the next two months, authorities recorded several conversations between defendant and Faller or Westminster.

Under the circumstances, and for the additional reasons further elaborated on by the district court in its thorough opinion and order denying defendant's Rule 29 motion, we conclude that there was sufficient evidence upon which a rational trier of fact could have found the essential elements of the charged offenses beyond a reasonable doubt. *Abboud*, 438 F.3d at 589. The district court therefore properly denied defendant's motion for judgment of acquittal.

V.

Defendant next maintains that certain recorded conversations between himself, Faller, and Westminster violated his Sixth Amendment right to counsel because at the time the conversations were recorded, the government's investigation had shifted purportedly from investigation to accusation, and the lawyer, Tully Rogers, whom defendant had already retained to represent him in his insurance dealings with Grange after the possibility of arson was raised, was not notified. Rogers had been retained by defendant months before any secret tapes were made. Defendant asserts that the trial testimony reflected the widespread knowledge of the government's witnesses that Rogers represented defendant in the arson-related matter with his insurer. No evidence was presented that Rogers consented to the secret taping which was done without defendant's knowledge. Defendant argues, therefore, that all evidence garnered from these taped conversations must be suppressed.

McAuliffe acknowledges, however, that no motion to suppress was made to the district court. Defendant's claim is therefore subject to review for plain error. *United States v. Olano*, 507 U.S. 725, 736, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993). No such error has occurred under the present circumstances.

As this court has explained in *United States v. Cope*, 312 F.3d 757, 772 (6th Cir. 2002):

> The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. Statements elicited in violation of one's Sixth Amendment right to counsel must be

> suppressed. *Massiah v. United States*, 377 U.S. 201, 207, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964). But "[t]he Sixth Amendment right [to counsel] . . . is offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *McNeil v. Wisconsin*, 501 U.S. 171, 175, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991) (internal quotation marks omitted).

"Once the Sixth Amendment right attaches, any governmental attempt to elicit information from the accused without the defendant's lawyer present, even through means that may be permissible under the Fifth Amendment right to counsel prior to the point at which the Sixth Amendment right to counsel attaches (e.g., electronic monitoring of a suspect's conversations with others), is prohibited." *Mitzel v. Tate*, 267 F.3d 524, 532 (6th Cir. 2001) (citing *Michigan v. Jackson*, 475 U.S. 625, 632, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986)).

Here, the last recording occurred one month before defendant was indicted, at a time when the government's investigation was still ongoing and he was a suspect, not yet an "accused." Moreover, as noted above in *Cope*, the Sixth Amendment right to counsel is offense-specific. Defendant's relationship with attorney Rogers was limited to his ongoing civil insurance-related dispute with Grange and was unrelated to the criminal charges that were eventually filed against him. Defendant's argument is therefore without merit.

VI.

As his final issue, defendant asserts that the forfeiture ordered by the district court at the sentencing hearing is unenforceable and violates his Sixth Amendment rights because, although the forfeiture was an integral part of the indictment and was included as a separate count, the jury never made any factual findings in this regard and defendant did not waive his right to have the jury make this determination. Defendant argues that the enhancement of his sentence by imposing forfeiture, in the absence of jury findings and on the basis of judge-made findings, violates *Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621. Because defendant did not raise this issue below, the plain error standard of review applies. *United States v. Hall*, 411 F.3d 651, 653 (6th Cir. 2005).

Defendant's argument is without merit. At the trial, after the jury returned their verdict on Counts One through Six, the jury was excused and counsel for the government stated,

> Your honor, there is a matter of the forfeiture counts, I believe, since there was a request to have the jury decide that. It would be up to you. I don't know if you want to do it now or perhaps save it until the sentencing hearing. I don't know if we have to do it now or we can wait. We would not present any more evidence other than what was already presented.

Defense counsel responded, "If the Court wants to take further evidence on that, I would request that it be done at the time of the sentencing hearing." Government counsel had no objection to the deferral proposed by defense counsel, and the court thus ruled that the matter would be considered at sentencing. It would appear from this exchange that defendant

had no objection to the forfeiture issue being resolved at the time of sentencing.

In any event, as the government points out, the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection. *Libretti v. United States*, 516 U.S. 29, 49, 116 S. Ct. 356, 133 L. Ed. 2d 271 (1995). *Booker* does not require a different result. *Hall*, 411 F.3d at 655 ("The absence of a statutory maximum or any sort of guidelines system indicates that forfeiture amounts to a form of indeterminate sentencing, which has never presented a Sixth Amendment problem. . . . [W]e fail to see how *Booker* requires us to turn over our prior precedent in this area ([.] *United States v Corrado*, [227 F.3d 543, 550 (6th Cir. 2000)]) or allows us to turn our back on the Supreme Court's prior ruling in this area (*Libretti*)."

The final order of forfeiture therefore did not violate defendant's Sixth Amendment right to a jury trial.

VII.

For the above reasons, we affirm defendant McAuliffe's convictions and sentences.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

Case No. CR-2-03-70

[Filed December 20, 2005]

UNITED STATES OF AMERICA,	)
Plaintiff	)
	)
v.	)
	)
DON S. MCAULIFE,	)
Defendant.	)
	)

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Date of Original Judgment
December 15, 2004

Reason for Amendment:
[x] Correction of Sentence on Remand (Fed. R. Crim. P. 35(a))

* * *

THE DEFENDANT:

* * *

_x_ was found guilty on counts one (1), two (2), three (3), four (4), five (5) and six (6) of the Indictment after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
18 U.S.C. §1341	Mail Fraud	4/22/02	One & Two
18 U.S.C. §§844(b) and 2	Use of fire to commit mail fraud	4/22/02	Three
18 U.S.C. §844(m)	Conspiracy to use fire to commit mail fraud	4/22/02	Four
18 U.S.C. §1957	Money laundering	4/30/02	Five
18 U.S.C. §1957	Money laundering	6/6/02	Six

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

* * *

December 8, 2005
Date of Imposition of Sentence

/s/
Signature of Judicial Officer

Algenon L. Marbley
United States District Judge

12/20/05
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of**THIRTY-SIX (36) on counts one (1), two (2), four (4), five (5) and six (6) to run concurrently.** ONE HUNDRED TWENTY (120) MONTHS on count three (3) to run consecutive to counts one (1), two (2), four (4), five (5), and six (6).

_x_ The Court makes the recommendations to the Bureau of Prisons that the defendant be incarcerated in a BOP located in Ashland, Ky or Morgantown, WV, or a facility which has the capacity of some form of segregation. Further, that the defendant participate in mental health evaluation and counseling and undergo substance abuse counseling including, but not limited to the 500 Hour Residential Drug Treatment Program.

_x_ The defendant is remanded to the custody of the United States Marshal.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS on each of counts one (1), two (2), three (3), four (4) five (5) and six (6) to run concurrently. As a special condition of supervised release the defendant shall submit to random drug testing and enter into substance abuse treatment as recommended by the U.S. Probation Office. Further, the defendant shall participate in a mental health evaluation and follow any treatment recommendation as a result of the evaluation. The defendant shall participate in a treatment program until released from said program by the U.S. Probation Officer. Further, the defendant shall permit the U.S. Probation Officer access to any requested financial information.

The defendant shall report to the probation office in the district into which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within fifteen (15) days of release from imprisonment and at least two (2) periodic drug tests thereafter, as directed by the probation officer.

* * *

_x_ The defendant shall not possess a firearm as defined in 18 U.S.C. §921.

If this judgment imposes a fine or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this Court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthful all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer 10 days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record of personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

Count	Assessment	Fine	Restitution
One	$100.00	$150,000.00	
Two	$100.00		
Three	$100.00		
Four	$100.00		$235,000.00
Five	$100.00		
Six	$100.00		
Totals:	**$600.00**	**$150,000.00**	**$235,000.00**

* * *

RESTITUTION

* * *

x The defendant shall make restitution to the following payees in the amounts listed below. While incarcerated, if the defendant is working in a non-UNICOR or grade-5 UNICOR job, the defendant shall pay $25 per quarter toward his fine obligation. If working in a grade-4 UNICOR job, he shall pay 50% of his monthly payment toward his fine obligation. Any change in this schedule shall be made only by order of this Court.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Grange Insurance P.O. Box 182085 Columbus, Ohio 43218	$235,000.00	$235,000.00	
Totals:	**$235,000.00**	**$235,000.00**	

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total free and other criminal monetary penalties shall be due as follows:

A _x_ in full immediately; or

* * *

D _x_ Through participation in the Bureau of Prisons' Inmate Financial Responsibility Program. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

* * *

Special instruction regarding the payment of criminal monetary penalties:

* * *

_x_ The defendant shall forfeit the defendant's interest in the following property to the United States: (A) Real Property known and numbered as, 3765 Northbank Road, Millersport, Ohio 43046, Fairfield County, Ohio with all appurtenances and attachments thereon as legally described in Attach,ent A, (B) Real Property known and numbered as 13580 Hollywood Blvd., Millersport, Ohio 43206, Fairfield County, Ohio with

all appurtenances and attachments thereon as legally described in Attachment B, and 1997 Jeep Wrangles 2DR sport, Vin #: 1J4FYI9S8VP452252.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts, Office of the Clerk, 85 Marconi Boulevard, Room 260, Columbus, Ohio 43215 except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.